Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	**GN Docket No. 10-25**
The Future of Media and Information Needs of Communities in a Digital Age	)	

COMMENTS OF
THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC)

Statewide cable and video franchise reforms have spurred competition and consumer choice in cable and video services. Such reforms have also facilitated rapid deployment of high-speed broadband. Competing services and platforms offer greater promise for public, governmental and educational (PEG) programming viewing options for consumers than legacy regulations meant for outdated technologies and monopoly "bottlenecks." Innovation and competition facilitated by statewide franchise reform benefit all consumers, including viewers of PEG programming. By contrast, new video content regulations are unnecessary and raise constitutional problems.

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STATEMENT OF INTEREST

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, individual membership organization of state legislators. ALEC's mission is to promote the Jeffersonian principles of individual liberty, limited government, federalism, and free markets. Through its Telecommunications and Information Technology Task Force, ALEC has analyzed and developed important public policy concerning cable and video networks, as well as broadband networks.

ALEC Supports Minimal Regulation of Cable & Video Networks

Pursuant to an examination of numerous cable and video policy issues in recent years, ALEC has adopted several official policies concerning cable and video networks.[1] In sum, ALEC believes the free marketplace has allowed for competing providers to offer consumers an abundance of video programming variety and price options through rapidly advancing technologies. According to its official policy:

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[1] *E.g., ALEC Resolution Opposing Government Intervention in the Multichannel Video Programming Distribution Marketplace Through A La Carte or Tiering Requirements* (opposing government-mandated a la carte distribution or specialized tiering requirements for multichannel programming video distribution); *ALEC Resolution Opposing Government Involvement in Commercial Negotiations* (opposing government-mandated arbitration to resolve commercial disputes, including disputes between video program networks and video distributors); *ALEC Cable and Video Competition Act*, discussed *infra*.

> ALEC opposes government intervention in a multichannel video programming distribution marketplace that has fostered unprecedented growth in the availability, quality and diversity of video programming to consumers, while also spurring the deployment of new and beneficial services like High Speed Internet service, high definition television, and VoIP.[2]

Rapid growth in this dynamic and increasingly competitive marketplace leads ALEC to oppose additional regulatory burdens on cable and video network providers, including specialized tiering mandates. It is ALEC's view that only minimal regulation in this area is appropriate in the 21st Century video marketplace.

ALEC Supports Statewide Video Franchise Reforms

ALEC's official policy concerning state video franchising is its *Cable and Video Competition Act*. ALEC's model embodies the public policy that states can and should provide state-issued authorization for competitive cable and video service providers to deploy their systems and provide cable and video service to residents of their state. ALEC's official policy is that state-issued grants better allow all competitive cable and video service providers to move forward in making the significant investments required to provide new services and competition for video programming than under regimes involving tangles of innumerable local franchise agreements.

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[2] *ALEC Resolution Opposing Government Intervention in the Multichannel Video Programming Distribution Marketplace Through A La Carte or Tiering Requirements*.

Numerous states have enacted statewide video franchise reform based in significant part on the framework provided by ALEC's model.[3]

ALEC Supports Regulatory Parity Concerning PEG Programming Requirements Contained in Statewide Franchising Agreements

ALEC takes no official position as to whether or not states should insist on PEG programming requirements in statewide cable and video franchise agreements. However, consistent with its *Cable and Video Competition Act*, ALEC insists that where states insist on PEG programming as component of cable and video franchises, competitive cable and video providers be accorded regulatory parity. This means that new competitors should designate a sufficient amount of capacity on their video networks to allow the provision of a comparable number of channels or capacity of PEG programming provided by the incumbent cable operator. Because different cable and video services rely upon different platform technologies, overly strict mandates concerning channels or capacity are impractical and ill-advised. Statewide franchise agreements should *not* freeze into place a particular method of delivering PEG programming but accord cable and video providers the necessary flexibility to offer PEG programming in new and innovative ways.

[3] States that have adopted statewide franchising laws include: California, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

ALEC Opposes "Public Interest" Content Regulation of the Internet, but Supports Broadband Adoption to Promote PEG Programming Choices for Consumers

ALEC recognizes that broadband technologies are currently being used to allow consumers to access PEG programming via the Internet. It is important for policymakers to recognize the potential for broadband technologies in delivering an increasing variety PEG programming that caters to individual broadband user preferences. It is also important that the Internet and broadband technologies remain free of government-imposed content mandates, and that government not attempt to impose existing PEG programming requirements on the Internet or broadband.

ALEC believes that competitive broadband service, coupled with the government's "hands off" policy toward broadband remain the best environment for the flourishing of PEG programming. It is ALEC's official policy that "any government policy that unnecessarily delays and impedes providers from offering new and existing voice, video or data service choices over their own networks restricts investment, reduces consumer choice and is not in the public interest."[4] For this reason, ALEC opposes any new "public interest" regulation of the Internet or broadband regarding PEG programming.

[4] *ALEC Resolution Supporting Pro Consumer Public Policy for Voice, Video, and Data Services*.

Rather, ALEC supports broadband adoption measures that will help more consumers to have more PEG-type programming options available to them. ALEC believes that "expanding adoption, use and digital literacy skills will allow a greater number of Americans to fully take advantage of the benefits of broadband based applications such as tele-health, energy management and education opportunities online."[5] ALEC also believes that increasingly widespread availability of PEG-type programming via the Internet can spur broadband adoption, all as part of a virtuous circle. Accordingly, ALEC believes that adoption of broadband technologies by PEG programmers and increased adoption of broadband by PEG programming viewers should be preferred over any kind of "public interest" PEG content regulations of the Internet or broadband.

[5] *ALEC Resolution Calling on the Federal Government to Maximize its Stimulus Support for Broadband and Internet Adoption and Use Programs.*

ANALYSIS

I. GOVERNMENT INTRUSION IN THE MEDIA AND SPEECH MARKETPLACE IMPROPERLY CHILLS FREE PRESS AND SPEECH

As an initial matter, ALEC respectfully expresses concerns about the propriety of the Commission's wide-ranging inquiry into the future of journalism, publications, news outlets, media platforms, and citizen speech. To put the matter squarely: why is the Commission taking upon itself the role of deciding the future of media and the information needs of communities? And how does this inquiry relate to its delegated authority?

As an organization committed to free markets, limited government, and individual liberty, ALEC believes that freedom of speech and freedom of the press are rights belonging to individuals by nature, protected from government intrusion by the U.S. Constitution. It is ultimately the role of government to safeguard the preexisting speech and press rights of individuals under the Constitution.

Accordingly, government should not attempt to take upon itself the role of deciding what types of speech or speech content should be expressed. Nor should government seek to decide for itself whether enough of the right kinds of speech or right kinds of speech delivery are taking place. ALEC believes it is particularly presumptuous for any governmental body or

agency to make conclusions about what media, information, or speech best serve the public interest – especially where the public itself has expressed its own interests through its viewing preferences and habits.

Federal and state regulatory agencies should act in conformity with their delegated powers and not exceed their jurisdictional authority. Clearly, were the Commission to initiate rulemakings on many of the subjects of the current proceeding, it would run into significant jurisdictional barriers. The Commission's public notice poses questions ranging everywhere from news publication business models, to potential journalism subsidies or bailouts, to Internet search engine practices, to mobile-based applications for news and information, etc. Accordingly, while a Commission report on such a variety of subjects may be permissible, we believe that a conscious recognition of the Commission's limited jurisdiction should temper its consideration and any conclusions about such subjects.

ALEC believes it particularly improper for government bodies and agencies to engage in policymaking adventurism in the realm of speech and journalism. Free press and free speech are vital underpinnings of our constitutional order. Government pronouncements and preferences concerning speech may easily pose chilling effects on the free marketplace of ideas, even if unintended.

ALEC is also wary of even purportedly limited government intrusions in the media and information marketplace. On the one hand, government policy initiatives and programs easily outgrow and expand beyond their original confines, taking on a life of their own never intended by their originators. On the other hand, even light-touch government involvement in the media and information landscape can result in unintended heavy-handedness. Getting government involved in private marketplace conduct at a "just right" amount is a difficult undertaking that presumes a degree of technical expertise and certainty that is ultimately unrealistic in a rapidly changing environment characterized by innumerable decisions by countless individual speakers and audience members.

ALEC therefore cautions the Commission against intrusions into the media and speech marketplace.

II. PEG PROGRAMMING IS BEST PROMOTED BY INNOVATION AND COMPETITION, NOT BY NEW REGULATION

ALEC's comments in this proceeding are primarily directed in response to the Commission's questions concerning PEG programming. Federal communications law permits states to impose certain PEG

obligations on cable and video franchisees.[6] In ALEC's view, the increased competition spurred by statewide franchise reforms have resulted in enhanced PEG viewing choices for consumers. And advanced broadband technologies offer additional promise to deliver PEG programming services to consumers. These developments obviate the need for any additional federal regulation with respect to PEG programming. In addition, speech regulation of cable and video network raise First Amendment difficulties.

A. Federal Law Permits But Does Not Require PEG Programming Be Provided in Cable Franchise Agreements

As a backdrop to any discussion of PEG programming requirements in cable and video franchise agreements, it is important to reiterate that federal communications law permits PEG requirements in cable franchise agreements, but does not mandate them. As ALEC related in greater detail to the Commission last year in a different proceeding,[7] under the terms of federal law it is self-evident that states have the option of making cable franchise requirements contingent upon cable operators' designating

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[6] *See* Public Notice, *In the Matter of The Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25 (January 21, 2010) at 7, no. 27.

[7] ALEC Reply to Comments, *In the Matter of Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in* City of Dearborn et al. v. Comcast of Michigan III, Inc. et al, MB Docket No. 09-13 (March 31, 2009), *available at*: http://www.alec.org/am/pdf/telecom/ALECReplyComments-PEG033109.pdf.

capacity for PEG programming. The *Cable Act of 1984* makes unmistakably clear that the provision of PEG programming in the states is optional.[8]

Moreover, the plain terms of federal law concerning PEG programming do *not* preempt statewide video and cable franchise laws. Federal law most relevant to PEG programming is devoid of any "plain statement" of Congressional intent to preempt states' discretion in requiring or not requiring PEG programming as a condition for awarding cable franchises.[9] Although one federal trial court in Michigan reached a contrary conclusion in a case that was recently settled between the parties,[10] that

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[8] *See* 47 U.S.C. § 541(a)(4)(B)("In awarding a franchise, the franchising authority…*may* require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support.") (emphasis added); 47 U.S.C. § 531(a) ("A franchising authority *may* establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section") (emphasis added); 47 U.S.C § 531(a):

> A franchising authority *may* in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal…that channel capacity be designated for public, educational, or governmental use, and channel capacity or institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

(emphasis added).

[9] *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460-461, 111 S.Ct. 2395 (1991) (asserting that States' retention of substantial sovereign powers under the constitution requires that Congressional legislation intending to alter the balance between the States and the federal government be "unmistakably clear in the language of the statute") (cite omitted).

[10] *See City of Dearborn v. Comcast of Michigan*, 2008 U.S. Dist. LEXIS 77755 (E.D. Mich. Oct. 3, 2008) at *11-*14 (holding that § 531 preempts Michigan's *Uniform Video Services Local Franchise Act of 2007*); *Order*, Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of *Dearborn et al. v. Comcast of Michigan III Inc et al*., MB Docket No. 09-13, CSR-8128 (March 16, 2010) (ganting City of Dearborn *et al*.'s Motion to Withdraw Petition for Declaratory Ruling and dismissing its Petition for Declaratory ruling).

conclusion was rejected by a federal trial court in Florida,[11] and ALEC reiterates its belief that the ruling of the District Court in Michigan would *not* have withstood an appeal.

A plain reading of the law, the lack of any clear statement for preemption, as well as constitutional prohibitions against federal interposition between states and their subdivisions[12] all require that state franchising laws and state authority over local governments be respected.

B. Increased Cable and Video Competition Resulting from Statewide Franchise Reforms Gives Consumers Enhanced PEG Viewing Choices

One of the benefits of increased cable and video competition made possible by statewide franchise reform is the availability of innovative technologies to enhance consumer viewing. With respect to PEG programming and other programming, cable and other video providers are upgrading their services to digitize content to provide consumers a superior viewing and listening experience. Moreover, emerging IP-based video services are able to provide consumers with access to even more PEG programming and other content than ever before.

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[11] *City of St. Petersburg v. Bright House Networks, LLC*, 2008 U.S. Dist. LEXIS 100576 (M.D. Fla. Dec. 12, 2008) at *10, *12-*13 (casting significant doubt on the result reached by the Eastern District of Michigan and rejecting claims that Florida's *Consumer Choice Act of 2007* was preempted by federal law or otherwise unconstitutional).

[12] *See* fn 7, *supra* (discussing state sovereignty aspects of state and local government relationships and anti-commandeering limits on federal power).

In ALEC's view, these innovative features should be encouraged by pro-market policies. But it would be mistaken to attempt to freeze the state of older technologies in place through regulatory mandates. As more and more programming content moves to digital and HD, federal and state governments should reject calls to impose across-the-board analog signal or basic tier requirements on cable and video service providers.

C. Broadband Gives Consumers Increased PEG Viewing Options

Aside from increased PEG programming viewing choices available to consumers through increasing cable and video service competition, PEG programming is also available to consumers through additional outlets. It is simply no longer the case that cable television is the only delivery method for PEG programming. PEG programmers can make their content available online, giving consumers the option of either watching archived PEG programming or live PEG programming via the Internet. Mobile broadband can similarly serve as a PEG programming conduit to consumers. Specialized smartphone applications can allow PEG programmers to reach consumers through their handheld wireless devices.

D. Growth in Marketplace Competition, Emergence of New Technologies, and Regulatory Changes Render Additional Regulation Unnecessary and Counterproductive

Regulation of the marketplace is typically justified in one or more of three situations. Those include situations where: (1) transactions between producers and consumers impose external costs on third parties; (2) monopolization or lack of existing or potential competition unduly limit consumer choice; and/or (3) informational asymmetry exists between producers and consumers concerning technical or complex knowledge about a product or service.

With respect to PEG programming availability on cable and video networks, no externalities or informational asymmetries appear to exist to warrant regulation. Moreover, monopolistic concerns that led to legacy regulation of cable services are no longer warranted given the flourishing of marketplace competition in video under deregulatory initiatives.

The state of the overall video marketplace was aptly summarized in a recent ruling by the U.S. Court of Appeals for the District of Columbia Circuit:

> [T]he record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly

> in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.[13]

As mentioned previously, broadband is also being used to deliver video to consumers. And wireless broadband is increasingly being used by consumers to view video content. Accordingly, the monopoly "bottleneck" said to exist in earlier days is all but absent in today's dynamic marketplace. Where such competition now thrives, expansion of legacy regulation to today's market is totally unnecessary.

Old statutory and regulatory barriers to competitive entry into the video marketplace have been removed at the federal and state levels, as indicated earlier. ALEC believes that recent deregulatory policies have fostered robust competition and technological advancements in the video marketplace. In ALEC's view, this deregulatory trend should be continued.

E. Expanding PEG Programming Regulatory Mandates for Cable and Video Networks Raise Significant Constitutional Issues Under the First Amendment

Finally, the Commission should be mindful that any ambitious expansion of PEG programming mandates through "public interest"

[13] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C.Cir. 2009)

regulation present constitutional difficulties in light of growing competitive market conditions and First Amendment jurisprudence.

PEG programming mandates are a type of forced-speech requirement, presumably justified under the monopoly "bottleneck" rationale discussed above. Forced-speech obligations are typically held unconstitutional.[14] And while certain forced-speech requirements have been upheld, the underpinnings of those decisions have been thrown into doubt by some of the recent marketplace developments and deregulatory initiatives discussed previously.

Recent U.S. Supreme Court opinions have cast into doubt the technologically non-neutral treatment that cable systems have been subjected to under the *Turner I* and *II* decisions in the 1990s.[15] As the Supreme Court majority proclaimed just this year, courts "must decline to draw, and then redraw, constitutional lines based on particular media or technology used to disseminate political speech from a particular speaker" and that "[r]apid changes in technology – and the creative dynamic inherent in the concept of free expression – counsel against upholding a law that

[14] *See, e.g., Miami Herald Publishing Co. v. Miami*, 418 U.S. 241 (1974).

[15] *See Turner Broadcasting Systems, Inc. v. FCC* ("*Turner I*"), 512 U.S. 622 (1994), *Turner Broadcasting Systems, Inc. v. FCC* ("*Turner II*"), 520 U.S. 180 (1997).

restricts political speech in certain media or by certain speakers."[16] There is strong reason to believe that the Supreme Court will revisit the analytical foundations of the *Turner* decisions in the near future and declare that any forced-speech obligations imposed on cable and video systems should be subject to strict scrutiny just like other forced-speech obligations. Serious doubts exist as to whether forced speech requirements of any kind can be supported by a compelling state interest that is narrowly tailored to achieve that purpose, as the strict scrutiny standard requires.

There is also serious question whether such mandates would even survive intermediate-level review in light of the growth in marketplace video competition and the demise of old regulatory barriers to entry. (Intermediate-level scrutiny requires a law be a means substantially related to the furtherance of an important governmental interest.) Four dissenting justices in the *Turner* cases would have rejected the must-carry requirements of the Cable Act of 1992 under the intermediate standard, as they did not consider those requirements to be content-neutral. Similarly, there is seriously question now as to whether PEG programming requirements can be considered content-neutral, as the entire category is defined by its contents: public, educational and governmental programming. Moreover,

[16] *Citizens United v. FEC*, 588 U.S. ____ (2010), Slip Opinion at 9, 49.

analog signal and basic tier requirements can impose real burdens on cable providers, prompting them to drop other programming preferred by consumers in order to make room for government-required programming. And such onerous requirements interfere with the editorial discretion exercised by cable programmers in determining their channel line-ups.

All of the foregoing suggests that many existing PEG programming mandates in the states may be subject to serious federal or state constitutional challenge. ALEC ventures no definitive legal conclusion in this regard at this time. Nonetheless, ALEC believes these considerations should lead the Commission, and the federal and state governments in general, to approach the possibility of expanding PEG or other programming mandates to currently regulated or unregulated technological platforms with care paid to the heightened constitutional concerns raised by forced speech mandates. Given the emergence of cable video competition and the emergence of broadband platforms to deliver PEG content, ALEC believes that continuing a "hands off" approach to the Internet and incentivizing continuing competition between providers and platforms offers superior, sustainable opportunity for robust speech opportunity for PEG programmers than constitutionally questionable regulation.

CONCLUSION

Cable and video competition facilitated by federal deregulatory reform and through statewide franchise reforms benefit consumers who wish to enjoy increased and enhanced programming choices, including PEG programming. And thanks to high-speed and wireless broadband, more consumers have more ways of accessing PEG programming than ever before. Accordingly, government should look for further ways to reduce barriers to entry in cable and video services and to promote broadband adoption as an alternative to imposing new or expansive regulation of dubious constitutionality.

Respectfully submitted,

Seth Cooper

Director,
Telecommunications &
Information Technology Task Force
American Legislative Exchange Council
1101 Vermont Ave NW, 11th Floor
Washington D.C., 20005
(202) 742-8524

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